Tyco Engineering & Construction (M) Sdn Bhd v James Francis Trimble & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R1–25–24 OF 2001
RAUS SHARIF J
31 MAY 2005

Labour Law — Employment — Termination of employment — Reduction of workload — Whether respondent's services terminated due to reduction of workload

The first respondent, an expatriate, was employed by the applicant as a project manager with effect from 25 January 1996. In April 1997, the applicant underwent an organisational restructure where the first respondent was terminated apparently due to the reduction of the applicant's workload. The Industrial Court found that the first respondent was dismissed without just cause and excuse and ordered the applicant to pay the first respondent back wages for the duration of 24 months and 26 days which amounted to the sum of RM298,000 and compensation in lieu of reinstatement of one month's salary for every completed year of service from the first respondent's date of joining, 25 January 1996 to 26 June 2000. The applicant therefore applied for an order of certiorari to quash the award.

The applicant submitted that: (1) the Industrial Court had failed to give emphasis to the explanation given by the applicant for terminating the services of the first respondent, ie that there was a reduction of workload; (2) the second contract of employment — which provided that the first respondent's employment would be only for a duration of 12 months — was binding on both parties; (3) the terms and conditions of the Taking-Over Certificates was not the basis for the award of compensation to the first respondent as those terms and conditions did not form part of the first respondent's contract of employment with the applicant; and (4) the first respondent's employment was subject to him having a valid work permit to work in Malaysia and his work permit had expired on 14 October 1998.

Held, dismissing the application with costs:

(1) The learned chairman had made a finding of facts with regard to the duration of the first respondent's contract with the appellant. His finding was based on the evidence adduced before him whereby he accepted certain evidence and rejected some. He gave his reasons in doing so. Thus, it was not the duty of this court to re-evaluate the evidence and to come to another conclusion (see para 14).

(2) From the facts, it was clear that the first respondent took two weeks vacation to United Kingdom. When he returned he discovered that his

responsibilities which had by then extended to KL 028, KL 029 and KL 301 and KL 302 had been taken away by one Alan Kingston who was then in charge of duties that had once been assigned to the first respondent. Hence, there was in actual fact no reduction in the workload (see para 19).

(3) The learned chairman was right in not taking the second contract into consideration because on perusal of the contractual terms of the second contract, it was not a reflection of the actual position of the second respondent at the time of his termination or at the time the contract was purportedly prepared. The second contract was drawn up purely to facilitate the application for the first respondent's work permit. Thus, the learned chairman was right to conclude that the second contract did not reflect the benefits that the first respondent was receiving nor did it reflect the true position of the first respondent's contract of employment with the applicant at any material time (see para 23).

(4) The terms and condition reflected in the Taking-Over certificates formed part of the first respondent's contract of employment with the applicant. With regard to the first respondent's employment permit from the Immigration, it was the finding of the learned chairman that the first respondent was terminated not because of his work permit was not renewed but because another person had been appointed to take over his responsibilities and position. There was not an iota of evidence to indicate that the first respondent's functions were no longer required or that there was a reduction in the applicant's workload as alleged (see para 25).

[**Bahasa Malaysia summary**

Responden pertama, seorang expatriat, telah diambil bekerja oleh pemohon sebagai pengurus projek berkuatkuasa mulai 25 Januari 1996. Pada bulan April 1997, pemohon mengalami penstrukturan semula organisasi di mana responden pertama telah diberhentikan kononnya kerana beban kerja pemohon yang berkurangan. Mahkamah Perusahaan mendapati bahawa responden pertama telah dibuang kerja tanpa sebab dan alasan yang adil dan memerintahkan pemohon membayar responden pertama gaji tertunggak untuk tempoh 24 bulan dan 26 hari yang berjumlah RM298,000 dan pampasan pengembalian semula jawatan sebanyak satu bulan gaji bagi setiap tahun berkhidmat yang lengkap daripada tarikh kemasukan responden pertama, 25 Januari 1996 hingga 26 Jun 2000. Pemohon oleh itu memohon perintah certiorari untuk membatalkan award tersebut.

Pemohon berhujah bahawa: (1) Mahkamah Perusahaan telah gagal memberikan penekanan terhadap penjelasan yang diberikan oleh pemohon kerana menamatkan perkhidmatan responden pertama, iaitu terdapat pengurangan beban kerja; (2) kontrak pekerjaan kedua — yang memperuntukkan bahawa

pekerjaan responden pertama hanyalah untuk selama 12 bulan — mengikat kedua-dua pihak; (3) terma-terma dan syarat-syarat Sijil-Sijil Pengambilalihan bukanlah asas award untuk pampasan kepada responden pertama kerana terma-terma dan syarat-syarat tersebut tidak membentuk sebahagian daripada kontrak pekerjaan responden pertama dengan pemohon; dan (4) pekerjaan responden pertama tertakluk kepada beliau mempunyai permit pekerjaan yang sah di Malaysia dan permit pekerjaan beliau telah luput pada 14 Oktober 1998.

Diputuskan, menolak permohonan tersebut dengan kos:

(1) Pengerusi yang bijaksana telah membuat penemuan fakta berhubung tempoh kontrak responden pertama dengan perayu. Penemuan beliau adalah berdasarkan keterangan yang dikemukakan di hadapan beliau di mana beliau telah menerima keterangan tertentu dan menolak sebahagiannya. Beliau telah memberikan alasan-alasan beliau berbuat demikian. Oleh itu, ia bukan tugas mahkamah ini untuk membuat penilaian semula keatas keterangan itu dan tiba ke satu kesimpulan lain (lihat perenggan 14).

(2) Berdasarkan fakta berikut, adalah jelas bahawa responden pertama mengambil cuti selama dua minggu ke United Kingdom. Sekembali dari situ, beliau mendapati tanggungjawab beliau yang pada masa itu telah dilanjutkan kepada KL 028, KL 029 dan KL 301 dan KL 302 telah diambilalih oleh Alan Kingston yang bertanggungajawab terhadap tugasan berikut yang sebelum ini diserahkan kepada responden pertama. Justeru itu, pada hakikatnya tidak terdapat pengurangan dalam beban kerja (lihat perenggan 19).

(3) Pengerusi yang bijaksana adalah betul untuk tidak mengambilkira kontrak kedua kerana setelah meneliti terma-terma kontraktual kontrak kedua tersebut, ia tidak membayangkan kedudukan sebenar responden kedua pada masa pemberhentian kerja beliau atau pada masa kontrak tersebut dikatakan telah disediakan. Kontrak kedua tersebut telah dibuat semata-mata untuk memudahkan permohonan untuk permit perkerjaan responden pertama. Oleh itu, pengerusi yang bijaksana adalah betul untuk memutuskan bahawa kontrak kedua tersebut tidak menyatakan faedah-faedah yang diterima oleh responden pertama maupun kedudukan sebenar kontrak pekerjaan responden pertama dengan pemohon pada masa matan (lihat perenggan 23).

(4) Terma-term dan syarat-syarat yang dinyatakan dalam sijil-sijil pengambilalihan tersebut membentuk sebahagian daripada kontrak pekerjaan pertama responden pertama dengan pemohon. Berhubung permit pekerjaan responden pertama daripada pihak Imigresen, ia adalah penemuan pengerusi yang bijaksana bahawa responden pertama diberhentikan kerja bukan kerana permit pekerjaan beliau tidak diperbaharui tetapi orang lain telah dilantik untuk mengambilalih tanggungjawab dan jawatan

kedudukan beliau. Tiada sebarang keterangan untuk menunjukkan bahawa fungsi responden pertama tidak diperlukan lagi atau bahawa terdapat pengurangan dalam beban kerja pemohon sepertimana yang dikatakan (lihat perenggan 25).]

Notes

For cases on termination of employment, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1070–1140.

Legislation referred to

Companies Act 1965
Evidence Act 1950 s 114(g)

T Thavalingam (Zaid Ibrahim & Co) for the applicant.
Sumita Gnanarajah (Subahan Sumita & Associates) for the respondent.

Raus Sharif J:

[1] This is an application by the applicant, a company incorporated under the Companies Act 1965, for an order of certiorari to quash the Industrial Court Award No 718 of 2000. The Industrial Court had on 31 December 2000, found that the first respondent was dismissed by the applicant without just cause and excuse and ordered the applicant to pay the first respondent the followings:

(i) Unpaid back wages for the period the first respondent stood dismissed namely:
   (a) 1 June 1998 to 31 May 2000 (24 months)= RM288,000.00 (24xRM12,000)
   (b) 1 June 2000 to 26 June 2000 (26 days)= RM10,603.15

(ii) Petty cash reimbursement= RM10,603.15

(iii) Compensation in lieu of reinstatement — ie one month salary for every completed year of services from the date of joining (25 January 1996) to the last date (26 June 2000) of the employment period = RM48,000.

(iv) Currency depreciation to be made to the monthly wages above stated to be calculated on the basis of ½ month's salary at an average of the relevant current rates of exchange applicable for the months there at.

[2] The facts leading to this application by the applicant are as follows.

[3] The first respondent, an expatriate, was employed by the applicant as a project manager in the Fire Protection Services Department with effect from 25 January 1996. As a project manager, the applicant was responsible

for all fire protection works in connection with KL 021 and KL 026. KL 021 and KL 026 essentially denote the fire protection project packages connected with the Kuala Lumpur International Airport (KLIA) which project had been awarded to the applicant in or about May 1995. The project covered and included the design, procurement, installation, fabrication, testing commissioning, training, operations, maintenance for two years, spare parts for the third year of the fire protection system and all other stipulations as required in the specification and condition of the contract.

[4] By a letter dated 28 August 1996, the first respondent position of project manager was changed to that of project director for KLIA with effect from 1 September 1996. However, the change in position did not entail any change to the first respondent's responsibilities at the material time.

[5] In or about April 1997, the applicant underwent an organisational restructure. This was following the acquisition of Thorn Securities Fire Services by the applicant's parent company, Tyco International Ltd. The acquisition saw the consolidation of the operations of the Malaysian based companies which moved to one office. There were changes in the organisation structure. The general manager and the operations manager were to work together and report to the board of directors. The applicant was to be based at the Chan Sow Lin head office overseeing all KLIA projects from the applicant's headquarters as from September 1977. The first respondent's position in the applicant's company remained that as Project Director.

[6] On 6 March 1998, the applicant was informed that his services would be terminated at the end of May 1998 due to the reduction of the applicant's workload. Together with the letter, the applicant also attached and served a notice of termination of the first respondent's services dated 6 March 1998.

[7] On 10 March 1998, the first respondent wrote a letter to the applicant stating that he considered himself constructively dismissed with immediate effect. The applicant responded by a letter dated 12 March 1998, refuting the first respondent's allegation. In the same letter, the first respondent was requested to report back to work by 16 March, failing which he would be considered as having abandoned his contract of services on his own.

[8] The first respondent returned to work on 16 March 1998. However by a letter dated 18 March 1998, the applicant informed the first respondent of the client's refusal to have the first respondent on site and that in the best interest of all parties, that the first respondent not to report for work with effect from 23 March 1998. The first respondent was also informed that the applicant will honour all salary and benefits due to him for three months notice period, in line with the letter dated 6 March 1998.

[9] Thus, the first respondent's complaint before the Industrial Court was the manner in which the termination came about. According to the first

respondent, it was tainted with mala fide and/or that was an act of unfair labour practice and against the principle of natural justice and as such ought to be struck down. The Industrial Court after considering the evidence, found in favour of the first respondent. Hence, this application by the applicant.

[10] Before this court, the applicant mounted its challenge against the Industrial Court's award on four grounds. The first ground of challenge was in respect of what the learned chairman stated at p 17 of the award which reads as follows:

> It deserves to mention here that the company in its submission at length suggested retrenchment as a reason for the termination of the claimant. This court observes that there was no such plea in the statement in reply of the company. Parties are bound by their pleading. If at all there is any indication of a reduction in the workload of the company, there was nowhere to be seen in evidence. This court rejects its contention now.

[11] It was submitted by the applicant that in reaching the above decision, the Industrial Court had erred in law and/or acted in excess of its jurisdiction in that:

(i) it failed to give emphasis to the explanation/reason given by the applicant for terminating the services of the first respondent, as stated in its letter dated 6 March 1998 and annexed to the statement in reply, that is reduction of workload;

(ii) had erred in law/or considered irrelevant fact in particular the agreement between the applicant and its client, that is, the Malaysian Japanese Airport Consortium Sdn Bhd in connection with:

  (a) the Defects Liability Period for works carried out from 1 January 1988 and ended on 28 December 1999;

  (b) the Operations and Maintenance Contract which has started from 27 June 1998 and ended on 26 June 2000

  that is included in the Taking-Over Certificates as the basis for its decisions regarding the issue of the first respondent's co-operation when those terms and conditions were not part of the first respondent's contract of employment with the applicant;

(iii) it failed to consider the following relevant facts:

  (a) the first respondent's admission that the Fire Protection Services sub contract KL 021 and KL 026 for KLIA where he worked were substantially completed on 31 December 1997;

  (b) the evidence that the applicant did not require the services of the first respondent during the Defect Liability Period was not challenged by the first respondent during cross-examination;

(iv) its decision that the applicant had deliberately not produced evidence was wrong, without basis and therefore, the Industrial Court had erred in applying s 114(g) of the Evidence Act 1950 on the applicant;

(v) its conclusion that no evidence was adduced with regard to the applicant's reduction of workload was unreasonable and perverse.

[12] Thus, the issue is whether there is an error on the part of the learned chairman as raised by the applicant. With due respect, I do not see any error on the part of the learned chairman. It is clear that the learned chairman after analyzing the evidence before him, made certain findings of facts. With regard to the first respondent's duration of contract, the learned chairman found as follows:

> The Fire Protection Package under the charge of the claimant as explained by COW-1 covers the works mentioned in exh CL-64 A-K. The claimant also in his testimony clarified that those documents contain details of the scope of works and the different systems of the said Fire Protection Package. They include the design procurement, installation, testing, commissioning, training, comprehensive maintenance for two (2) years, spare parts for the third year of Fire Protection System and all other stipulations as required in the specification and the condition of contract (exh CL-64 A–D).
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> The claimant also gave evidence that yet a further clarification regarding the scope of works that he was responsible for can be seen particularly in exh CL-62 para 4, 5 and 6, namely the operation and maintenance and spare parts for the first and second year and also the training period for two years post completion that he was to undertake for the maintenance staff.
>
> On a careful perusal of the Taking-Over Certificate as can be seen in exh CO-2, a clear agreed provision has been made for a Defect-Liability Period commencing 1 January 1998 until 31 December 1999 as well as the Operation and Maintenance Period commencing 27 June 1998 and ending 26 June 2000.

[13] The learned chairman went on further to state:

> It is thereby evident that the very documentary evidence of the company and the testimony of its sole witness COW-1 had positively corroborated claimant's position in that respect. The claimant's testimony stood uncontroverted and is set out below as follows:
>
> > I was responsible for overseeing project at KLIA, the smooth operation of projects, to coordinate the designers, installers and supervisor. I had deadlines to meet and had to satisfy clients and ensure they are happy. I had regular meetings with them. I was in charge of the costs, budgets, forecasting setting up teams for testing, commissioning and the operation and maintenance following the completion of the installation. I also liaise with Bomba for approval of packages. I was also responsible for the defect-liability, maintenance periods and the whole scope of works relate to the project. Following the completion of the operation and maintenance portion of the package (fire protection), I was also responsible for

providing the lists of spare parts associated with the equipment required beyond the maintenance period.

The substantial works were completed by December 1997. My workload did not decrease by then because after December 1997, I had to focus on operation and maintenance, defect-liability and the completion of the works for all packages at KLIA. The defect-liability period, I would expect be very busy as it is an international airport. It was a tremendous amount number of interfaced system of fire protection. There were several miles of underground pipe works, hydrants and as and when required, that is, when the interlinked systems don't work, alterations would be required and additional works had to be carried out. I was required to be present during the defect-liability period to coordinate works of the package. I was also required to be present during the operation and maintenance period.

This court observed that no one else was called by the company to name a few, Alan Kingston, Paul Gritton, Annuar Nordin and Andy Ozolins (all top managerial and technical personalities), and of course, important too, the group of maintenance men who allegedly according to COW-1 performed the services of the claimant during the defect liability period and the maintenance contract period thereby dispensing with the need of the presence or employment of the claimant then. Those maintenance men are as follows:

(1) Marican Manalo (Filipino) — Electrical Engineer;

(2) Ainul Azam — Site Administrator;

(3) Tom Balau — QA Inspector; and

(4) Roslan — Foreman.

The suppressed state of evidence on the part of the company would call for the invocation of s 114(g) of the Evidence Act 1950.

[14] From the above, it is clear that the learned chairman had made a finding of facts with regard to the duration of the first respondent's contract with the appellant. His finding was based on the evidence adduced before him whereby he accepted certain evidence and rejected some. He gave his reasons in doing so. Thus, it is not the duty of this court to re-evaluate the evidence and to come to another conclusion.

[15] The learned chairman also dealt with the reasons for the termination of the first respondent. He stated as follows:

In the circumstances of this case, the court finds that the letter as in exh CL–51, must and irresistibly be the letter of termination as submitted by the claimant, unrebutted and furthermore, in the absence of any evidence to the contrary by Paul Gritton, Andy Ozolins and Annuar Nordin who were not called to testify otherwise. This court also observed with utter disbelief that yet another letter by the company (exh CL–48A) dated 12 March 1998 written by Paul Gritton, the General Manager was issued asking the claimant to report for work by 16 March

1998 but only to dismiss him effectively seven (7) days later vide a final letter by the same writer as in exh CL–51 dated 18 March 1998. This exercise is mala fide seen at its best here.

The events that took place earlier and culminating in the terminating of the claimant were entirely seen in the taking over of the claimant's duties as project director KL 021 and KL 026, a job he was contracted to perform. The evidence is plenty and it is interesting observation that as late as 12 March 1998, the eve of the claimant's summary dismissal as per exh CL–51A, the company had hitherto acknowledged the position by the claimant as project director (see exh CO–14 and exh CL–48A) even though it had knowledge, direct or otherwise of the assumption of the position and responsibilities of the claimant by Alan Kingston since about the time the former went on leave to the United Kingdom in December 1997/ January 1998.

According to the company's sole witness COW-1, while the claimant was on vacation in the United Kingdom, Alan Kingston who was responsible for an entirely different project which concerned the Kuala Lumpur City Centre (KLCC) a project the company was also handling concurrently at the material time, was acting in the claimant's position to oversee his duties. The claimant on his part testify that upon his return to Malaysia realised that all his duties had been taken over by Alan Kingston and that he said was the beginning of his problem. In his words:

> … He had also written to the clients and signed as project director. I was then basically doing correspondence and drafting letters for Alan to sign. I was just a figure-head … . I was not performing duties I was engaged for. My responsibilities were taken away. Alan was signing purchase orders signing letter and dealing with petty cash issues. These were functions I did before. He was also making deals and commitments with the staff that previously reported to me.

Also and in a clear and outright manner Alan Kingston had sent a memorandum to the claimant on 26 January (see exh CL–31) asserting not only his newly acquired duties that once were the claimant's but also transferring costs of the KLCC project to the KLIA Project 021 of which the claimant was responsible for. There were other events that took place viewed indicated an erosion of the claimant's responsibilities as project director of KLIA much too to the knowledge of the company. They are seen in the following documentary exh CL–26,CL–28, CL–30, CL–31, CL–32, CL–33, CL–34, CL–37, CL–38, CL–39, CL–40, CL–41, CL–42, CL–44, CL–45, CL–46 and finally CL–49 whereat on 12 March 1998, Alan Kingston himself wrote to the clients of the company (UPH Consortium) to address all correspondence to himself and not to the claimant, on which said date the company still acknowledged the claimant as project director (as indicated in exh CL–48A earlier referred to above). The company appeared to put a front but yet gave the liberty to Alan Kingston to steamroll the claimant. Was it shadow-play by the company or conspiracy in silence resulting in the company to finally dismiss the claimant summarily and unjustly. The finding of this court is in the affirmative.

It deserves mention here that the company in its submission, at length suggested retrenchment as a reason for the termination of the claimant. This court observes

that there was no such plea in the statement of reply of the company. Parties are bound by their pleadings. If at all there is any indication of a reduction in the workload of the company, this was nowhere to be seen proven in evidence. This court rejects its contention now.'

[16] Again, the learned chairman has given his reasons as to why he did not accept that retrenchment was a reason for the termination of the first respondent. The learned chairman found it as a fact that the termination of the first respondent was not due to reduction on the workload. The learned chairman found that the applicant had failed to adduce evidence to support its contention that the termination was due to reduction on the workload. I have no reason to disagree. Thus, there is no merit on the applicant's first ground of challenge.

[17] The applicant's second ground of challenge is in respect of the learned chairman's conclusion at p 15 of the award which reads:

the events that took place earlier and culminating in the termination of the claimant were entirely seen in the taking over of the claimant's duties as project director of the KL 021 and KL 026, a job he was contracted to perform.

[18] It was submitted by the applicant that the Industrial Court had erred in law and/or acted in excess of its jurisdiction in that:

(1) it failed to consider that the first respondent's claim in his letter dated 10March 1998, when he had treated himself as being constructively dismissed, had been abandoned when he reported for work on 16 March 1998 and later claimed that his service had been terminated with effect from 23 March 1998;

(2) it has erred in interpreting the applicant's letter dated 6 March 1998, which notified the first respondent that his services would be terminated at the end of May 1998, was received by the first respondent on 10March 1998; and

(3) its decision that the duties and responsibilities of the first respondent had been taken over deliberately by another worker by the name of Alan Kingston and the subsequent termination of the first respondent's services was mala fide was unreasonable and perverse.

[19] Again, I am unable to agree with the applicant. From the facts, it is clear that the first respondent took two weeks vacation to United Kingdom. When he returned he discovered that his responsibilities which had by then extended to KL 028, KL 029 and KL 301 and KL 302 had been taken away by one Alan Kingston who was then in charge of duties that had once been assigned to the first respondent. Hence, there was in actual fact no reduction in the workload. The learned chairman dealt with the issues as follows:

Two letters of employment were put in evidence. They are exh CO–1 (hereinafter referred to as the 'first contract') and exh CO–7 (hereinafter referred to as 'the second contract') dated 8 December 1995 and 12 August 1997 respectively.

The company contended that the second contract superseded the first contract. In this case it (the second contract) therefore applies and the complainant's employment would then be only for a duration of twelve (12) months commencing 20 September 1997, unlike the first contract which merely stated the effective starting date being 25 January 1996. It is to be noted here too that the first contract in comparison also sets out other different better terms, namely, the salary and the incentive of two (2) per cent of the gross profits of all airport contracts under the control of the claimant.

The company also contended that the second contract is binding on both parties and in the words of CCW–1, to make it 'clearer and better worded'. As against this contention, the claimant testified that the second contract is a total fabrication as it did not reflect his actual position then in the company. He adverted that the proper contract that should apply to him is the one that truly reflected the terms, conditions and benefits that he was then accorded by the company — in other words, the second contract was totally inapplicable and inconsistent with what the claimant was actually receiving at that material time. In fact the company's sole witness COW–1 (the Human Resource Manager) had this to explain when he testified that:

> 'I agree that the second contract does not reflect the actual position of the claimant until his termination. The second contract had to reflect the position title of the claimant as project manager for clearance by immigration ... the salary was the claimant's old salary which is lower than what the claimant was receiving on 12 August 1997.'

It is also to be noted that at the material time of the second contract (see letter of company dated 28 August 1996 exh COE–5), the position of the claimant with the company was that of project director for KLIA as with effect from 1 September 1996, other terms and conditions of the employment remaining unchanged. Hence the claimant's weighty contention that the second contract was merely drawn up to facilitate the application for his work permit with immigration and for no other purpose.

There has been no evidence in rebuttal by the company. The second contract therefore has no probative value as far as this case is concerned and this court does not accept it. The claimant also claimed that the signature in the said contract was not his. In this respect the company failed to call one Noora Othman who had witnessed the signing of the contract.

Her absence was deliberate and in that event s 114(g) of the Evidence Act 1950 is invoked against the company.

[20] Clearly, the findings of the learned chairman, was again on the facts. Again, I have no reason to review such findings.

[21] The applicant's third ground of challenge was that the Industrial Court took into consideration and made its decision based on the first respondent's allegation that his contract of employment dated 12 August 1997 was fabricated. Thus, it was submitted by the applicant that the Industrial Court has acted without jurisdiction and/or in excess of its jurisdiction in that:

(1) the allegation of fabrication was not pleaded in the first respondent's statement of claim or in other documents annexed to it;

(2) the allegation of fabrication was not put forward to the applicant's witness during cross-examination;

(3) its decision that the second contract had no probative value was unreasonable and perverse.

[22] The learned chairman dealt with the issue of the two letters of employment as follows:

> 'Two letters of employment were put in evidence. They are exh CO–1 (hereinafter referred to as the 'first contract') and exh CO–7 (hereinafter referred to as 'the second contract') dated 8 December 1995 and 12 August 1997 respectively.
>
> The company contended that the second contract superceded the first contract. In this case it (the second contract) therefore applies and the complainant's employment would then be only for a duration of twelve (12) months commencing 20 September 1997, unlike the first contract which merely stated the effective starting date being 25 January 1996. It is to be noted here too that the first contract in comparison also sets out other different better terms, namely, the salary and the incentive of two (2) per cent of the gross profits of all airport contracts under the control of the claimant.
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> The company also contended that the second contract is binding on both parties and in the words of COW-1, to make it 'clearer and better worded'. As against this contention, the claimant testified that the second contract is a total fabrication as it did not reflect his actual position then in the company. He adverted that the proper contract that should apply to him is the one that truly reflected the terms, conditions and benefits that he was then accorded by the company — in other words, the second contract was totally inapplicable and inconsistent with what the claimant was actually receiving at that material time. In fact, the company's sole witness COW-1 (the Human Resource Manager) had this to explain when he testified that:
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> > I agree that the second contract does not reflect the actual position of the claimant until his termination. The second contract had to reflect the position title of the claimant as project manager for clearance by Immigration ... the salary was the claimant's old salary which is lower than what the claimant was receiving on 12 August 1997.
>
> It is also to be noted that at the material time of the second contract (see letter of company dated 28 August 1996 exh COE-5), the position of the claimant with the

company was that of Project Director for KLIA as with effect from 1 September 1996, other terms and conditions of the employment remaining unchanged. Hence the claimant's weighty contention that the second contract was merely drawn up to facilitate the application for his work permit with Immigration and for no other purpose.

There has been no evidence in rebuttal by the company. The second contract therefore has no probative value as far as this case is concerned and this court does not accept it.

The claimant also claimed that the signature in the said contract was not his. Inthis respect the company failed to call one Noora Othman who had witnessed the signing of the contract. Her absence was deliberate and in that event s 114(g) of the Evidence Act 1950 is invoked against the company.

[23] I am of the view, the learned chairman was right in not taking the second contract into consideration because on perusal of the contractual terms of the second contract, it was not a reflection of the actual position of the second respondent at the time of his termination or at the time the contract was purportedly prepared. As pointed out by the learned chairman, the said fact was confirmed by the applicant's witness Encik Najib (COW–1) during cross-examination. Hence, it strengthened the first respondent's contention that the second contract was drawn up purely to facilitate the application for the first respondent's work permit. Thus, the learned chairman was right to conclude that the second contract does not reflect the benefits that the first respondent was receiving nor does it reflect the true position of the first respondent's contract of employment with the applicant at any material time.

[24] The fourth and final ground of challenge by the appellant was with regard to order that the applicant was to pay the first respondent back wages for the duration of 24 months and 26 days which amounted to the sum of RM298,000 and compensation in lieu of reinstatement of one month's salary for every completed year of service from the first respondent's date of joining, 25 January 1996 to 26 June 2000. It was submitted by the applicant that the Industrial Court in making the above orders had erred in law and acted in excess of its jurisdiction in that:

(1) it erred in law and/or considered irrelevant issues, that is the terms and conditions of the Taking-Over Certificates as the basis for the award of compensation to the first respondent notwithstanding that those terms and conditions did not form part of the first respondent's contract of employment with the applicant;

(2) it has failed to consider one relevant issue, that is the first respondent's employment was subject to him having a valid work permit to work in Malaysia and his work permit had expired on 14 October 1998;

(3) its orders were in conflict with the laws of Malaysia.

[25] Again, with respect, I am unable to agree with the applicant. I am of the view that the Industrial Court was correct to take the period into consideration in making its decision to award the first respondent compensation. The terms and condition reflected in the taking over certificate formed part of the first respondent's contract of employment with the applicant. With regard to the first respondent's employment permit from the Immigration, it was the finding of the learned chairman that the first respondent was terminated not because of his work permit was not renewed but because another person had been appointed to take over his responsibilities and position. As pointed by the learned chairman, there is not an iota of evidence to indicate that the first respondent's functions were no longer required or that there was a reduction in the applicant's workload as alleged.

[26] In conclusion, I am of the view that the Industrial Court had not erred in law and/or acted in excess of its jurisdiction. Accordingly, the applicant's application is dismissed with costs.

Application dismissed with costs.

Reported by Loo Lai Mee